No. 10-1068

In the Supreme Court of the United States

ACORN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that provisions in Fiscal Year 2010 appropriations acts, which bar distribution of federal funds to petitioner ACORN and its affiliates, subsidiaries, and allied organizations, are not unconstitutional bills of attainder.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 618 F.3d 125. The March 10, 2010, order of the district court granting a permanent injunction and declaratory judgment (Pet. App. 32a-77a) is reported at 692 F. Supp. 2d 260. The December 11, 2009, order of the district court granting a preliminary injunction (Pet. App. 78a-105a) is reported at 662 F. Supp. 2d 285.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2010. A petition for rehearing was denied on November 23, 2010 (Pet. App. 106a-107a). The petition for a writ of certiorari was filed on February 22, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the Association of Community Organizations for Reform Now (ACORN), a nonprofit organization, and its eligibility to receive federal grant monies in the current fiscal year. Because ACORN has an "incredibly complex" organizational and governance structure, Pet. App. 5a (citation omitted), this brief (like the court of appeals) draws on the report of an internal investigation commissioned by ACORN itself. See Scott Harshbarger & Amy Crafts, *An Independent Governance Assessment of ACORN* (Dec. 7, 2009), http://www.proskauer.com/files/uploads/report2.pdf (*Harshbarger Report*).[1]

a. ACORN is a nonprofit corporation that, as of the filing of this action, claimed 500,000 members located in 75 cities. Pet. App. 3a; 2d Am. Compl. ¶ 20. ACORN maintains close affiliations and relationships with numerous formally separate entities that together constitute the "ACORN Family." *Harshbarger Report* 6; Pet. App. 5a. The "number of separate but interrelated components" in the ACORN Family "at one point was estimated at approximately 200 entities," although by 2008 that number stood at 29 entities, including petitioners Acorn Institute and New York Acorn Housing Co. (New York Acorn). *Harshbarger Report* 6; Pet. App. 4a-5a. New York Acorn is now known as MHANY Management, Inc.

As of the fall of 2009, ACORN received approximately ten percent of its funding from the federal government. Acorn Institute has received federal grants and collaborates closely with ACORN to carry out many of

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[1] The Harshbarger Report is in the lower-court record in this case C.A. App. 258-304.

these grants. New York Acorn has received funding from the federal Department of Housing and Urban Development (HUD) through the New York State Housing Finance Agency. Pet. App. 3a-4a.

b. ACORN has been plagued by serious mismanagement, including embezzlement at its highest levels. In 1999 and 2000, Dale Rathke, the brother of ACORN's founder Wade Rathke, embezzled nearly $1 million from the organization. ACORN's officers failed to notify law enforcement officials or even ACORN's board of directors until June 2008, when a whistleblower forced ACORN to disclose the embezzlement. An internal report commissioned by ACORN in the wake of the embezzlement scandal detailed "'potentially improper use of charitable dollars for political purposes' as well as possible violations of federal law by ACORN and its 'web' of nearly 200 affiliated organizations." Pet. App. 5a.

In 2009, a new scandal arose when hidden cameras recorded ACORN employees and volunteers providing advice and supportive counseling to what appeared to be a proposed prostitution enterprise. Pet. App. 5a-6a. The Harshbarger Report concluded that the conduct recorded on the videos "represent[ed] the byproduct of ACORN's longstanding management weaknesses," *Harshbarger Report* 3, and "criticized ACORN's * * * overall failure to provide adequate organizational infrastructure necessary to manage and oversee its operations." Pet. App. 6a.

ACORN workers have also been convicted of voter registration fraud. Between October 2008 and May 2009, two more ACORN workers were charged with and convicted of voter registration fraud. Pet. App. 5a. The Harshbarger Report observed that "[t]he hidden camera

controversy [wa]s perceived by many as a third strike against ACORN on the heels of the disclosure in June 2008 of an embezzlement cover-up, which triggered the firing of ACORN's founder, and the allegations of voter registration fraud during the 2008 elections." *Harshbarger Report* 2; see also *id.* at 2 n.1 (noting that the Report did not examine voting-fraud allegations).

2. Following the revelation of those instances of misconduct and mismanagement, the federal government re-evaluated ACORN's fitness for federal funding.

a. First, in September 2009, two federal agencies—the Internal Revenue Service and the Census Bureau—terminated their relationships with ACORN in response to evidence of ACORN's misconduct. Pet. App. 6a.[2] Also in September 2009, Members of Congress asked the Government Accountability Office (GAO) to begin an investigation of ACORN, out of concern that the organization was improperly using federal funds. *Ibid.*

b. The next month, Congress enacted a restriction on ACORN's eligibility for federal funds as part of the 2010 continuing appropriations resolution, the measure that funded federal agencies until Congress enacted appropriations legislation for Fiscal Year 2010 (FY 2010). Pet. App. 7a; see Continuing Appropriations Resolution, 2010 (2010 Continuing Resolution), Pub. L. No. 111-68, Div. B, § 163, 123 Stat. 2053 (2009) (Pet. App. 108a-109a). Section 163 of the 2010 Continuing Resolution provided that "[n]one of the funds made available by this joint resolution or any prior Act may be provided to the Association of Community Organizations for Reform

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[2] Several States also suspended their funding of ACORN. Pet. App. 6a-7a.

Now (ACORN), or any of its affiliates, subsidiaries, or allied organizations."

In response to a request by HUD for guidance, the Office of Legal Counsel of the Department of Justice issued a memorandum explaining that the 2010 Continuing Resolution did not preclude agencies from making payments in satisfaction of pre-existing contractual obligations. *Applicability of Section 168 of Division B of Public Law 111-68 to Payments in Satisfaction of Existing Contractual Obligations* (Oct. 23, 2009), http://www.justice.gov/olc/2009/obligations-public-law11168.pdf (*OLC Memorandum*); see Pet. App. 8a.

The 2010 Continuing Resolution, along with its restrictions on ACORN funding, expired on December 18, 2009. See Act of Oct. 30, 2009, Pub. L. No. 111-88, Div. B, § 101, 123 Stat. 2972 (Pet. App. 111a).

c. When Congress subsequently adopted appropriations legislation to fund the federal government for FY 2010, it included restrictions on funding to ACORN by certain departments and agencies. Five provisions in certain FY 2010 appropriations acts bar distribution of funds to ACORN and related organizations. Four of those provisions specify that none of the federal funds appropriated under the relevant statute "may be distributed to the Association of Community Organizations for Reform Now (ACORN) or its subsidiaries."[3] The fifth,

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[3] See Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, Div. A, § 427, 123 Stat. 2904, 2962 (2009) (Pet. App. 110a-111a); Department of Defense Appropriations Act, 2010, Pub. L. No 111-118, Div. A, § 8123, 123 Stat. 3409, 3458 (2009) (Pet. App. 115a), Consolidated Appropriations Act, 2010 (2010 Consolidated Act), Pub. L. No. 111-117, Div. B, § 534, 123 Stat. 3157 (2009) (Pet. App. 113a); *id.* Div. E, § 511, 123 Stat. 3311 (Pet. App. 114a). The restriction in Division E of the 2010 Consolidated Act

which applies only to appropriations for the Department of Transportation, HUD, and related agencies, covers a slightly broader set of organizations related to ACORN: "None of the funds made available under this Act or any prior Act may be provided to the Association of Community Organizations for Reform Now (ACORN), or any of its affiliates, subsidiaries, or allied organizations."[4] See also Pet. App. 41a n.4 (listing FY 2010 appropriations acts not covered by ACORN-related funding restrictions).

In enacting the 2010 appropriations measures, Congress formally directed the Comptroller General (the head of the GAO) to "conduct a review and audit of Federal funds received by [ACORN] or any subsidiary or affiliate of ACORN" to determine whether any federal funds were misused, what steps can be taken to recover misused funds and prevent the misuse of funds, and whether all necessary steps were taken to prevent the misuse of funds. Congress required that the Comptroller General complete the investigation and report to Congress within 180 days.[5]

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applies to "funds made available in this division or any other division in this Act." *Ibid.* The six divisions of that Act cover Transportation, HUD, and Related Agencies; Commerce, Justice, Science, and Related Agencies; Financial Services and General Government; Labor, Health and Human Services, and Education, and Related Agencies; Military Construction and Veterans Affairs and Related Agencies; and Department of State, Foreign Operations, and Related Programs.

[4] Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-117, Div. A, § 418, 123 Stat. 3112 (2009) (Pet. App. 112a). That statute is Division A of the larger 2010 Consolidated Act.

[5] Commerce, Justice, Science, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-117, Div. B, § 635, 123 Stat. 3157-3158 (2009)

These provisions, along with most other provisions of FY 2010 appropriations measures, have been extended through the end of FY 2011 and are set to expire on September 30, 2011. See Department of Defense and Full-Year Continuing Appropriations Act, 2011, H.R. 1473, 112th Cong., 1st Sess. §§ 1101, 1104, 1106 (2011) (signed by the President on April 15, 2011, and to be published as Pub. L. No. 112-10).

3. On November 12, 2009, following the adoption of the 2010 Continuing Resolution, petitioners filed this action to enjoin the enforcement of the ACORN-related provision of that resolution. Petitioners alleged that the provision violated the Bill of Attainder Clause, U.S. Const. Art. I, § 9, Cl. 3, the First Amendment, and the Due Process Clause of the Fifth Amendment. They named as defendants the United States, the Secretary of the Treasury, the Secretary of HUD, and the Director of the Office of Management and Budget. Pet. App. 8a.

The district court concluded that petitioners were likely to succeed on their claim under the Bill of Attainder Clause, and it entered a preliminary injunction prohibiting enforcement of the restriction against providing federal funds to ACORN. Pet. App. 78a-105a. The government filed an appeal of the preliminary injunction.

After the preliminary injunction issued, plaintiffs amended their complaint to include the five ACORN-related provisions in the FY 2010 appropriations acts. Plaintiffs also added three new defendants: the Administrator of the Environmental Protection Agency, the Secretary of Commerce, and the Secretary of Defense. Pet. App. 10a.

(Pet. App. 113a) That statute is Division B of the larger 2010 Consolidated Act.

On March 10, 2010, the district court held in petitioners' favor under the Bill of Attainder Clause. Pet. App. 33a-77a. The court entered a declaratory judgment and a permanent injunction against the ACORN-related provisions of both the 2010 Continuing Resolution and the FY 2010 appropriations acts. *Id.* at 33a, 75a. The court did not address petitioners' First Amendment and due process claims.

4. The government timely appealed from the final judgment, and the court of appeals stayed the injunction pending appeal. Pet. App. 11a. Petitioners then applied to Justice Ginsburg to vacate the stay; Justice Ginsburg denied the application. *Association of Cmty. Orgs. for Reform Now* v. *United States*, No. 09A1000 (Apr. 23, 2010).

5. The court of appeals reversed the district court's Bill of Attainder Clause ruling and remanded the case for further proceedings on petitioners' other claims. Pet. App. 1a-32a.[6]

The court held that the challenged funding restrictions did not amount to legislative punishment and, therefore, did not violate the Bill of Attainder Clause. The court considered the three factors that, under this Court's decisions, guide consideration of whether a legislative act is punishment: (1) whether the statute falls within the historical meaning of legislative punishment; (2) "whether the statute, 'viewed in terms of the type and severity of the burdens imposed, reasonably can be said to further nonpunitive legislative purposes'"; and

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[6] While the case was pending in the court of appeals, HUD determined that petitioner SUHANY Management, Inc., formerly known as New York Acorn, was no longer an "affiliate, subsidiary, or allied organization of ACORN." Pet. App. 4a n.2 (citing Gov't C.A. R. 28(j) Letter (July 8, 2010)).

(3) "whether the legislative record evinces a [legislative] intent to punish.'" Pet. App. 18a (brackets in original) (quoting *Selective Service Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984)).

The court first determined that "withholding of appropriations * * * does not constitute a traditional form of punishment." Pet. App. 20a. Petitioners were not prohibited from any activities, but rather were only temporarily restricted from receiving federal funds to pay for those activities. *Id.* at 21a. The court of appeals concluded that that restriction was well within the congressional power of the purse; "Congress must have the authority to suspend federal funds to an organization that has admitted to significant mismanagement." *Ibid.* And, the court noted, ACORN derived only ten percent of its funding from the federal government, undermining petitioners' claims that the funding restriction alone targeted ACORN's very existence rather than its eligibility for grants. *Id.* at 20a.

The court next held that the appropriations provisions were reasonably tailored to serve the "non-punitive goal of protecting public funds from future fraud and waste." Pet. App. 28a-29a. The means Congress chose to further that goal were unlike past bills of attainder, such as "permanent disqualification from a certain vocation or criminalizing past conduct," the court concluded. *Id.* at 27a.

Finally, the court reiterated this Court's admonitions that "[t]he legislative record by itself is insufficient evidence for classifying a statute as a bill of attainder unless the record reflects overwhelmingly a clear legislative intent to punish." Pet. App. 29a. Applying that standard, the court concluded that petitioners had identified at most a "'smattering'" of statements by "a hand-

ful of legislators"—not enough to show an impermissible legislative intent to punish. *Id.* at 81a-82a.

6. The court of appeals denied rehearing en banc without recorded dissent. Pet. App. 106a-107a.

7. At petitioners' request, the district court has stayed proceedings on petitioners' remaining constitutional claims pending this Court's disposition of the petition for a writ of certiorari. See Order (May 9, 2011).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Furthermore, this case is in an interlocutory posture and may not even remain a continuing controversy, given the scheduled expiration of the challenged provisions and the bankruptcy of two petitioners. Review by this Court is therefore not warranted.

1. The Constitution provides that "[n]o Bill of Attainder * * * shall be passed." U.S. Const., Art. I, § 9, Cl. 3. A constitutionally forbidden bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 468 (1977); *Selective Service Sys.* v. *Minnesota Pub. Interest Research Group*, 468 U.S. 841, 846-847 (1984).

This Court has made clear that "[t]he proscription against bills of attainder reaches only statutes that inflict *punishment* on the specified individual or group." *Selective Service*, 468 U.S. at 851 (emphasis added). The Court has invalidated legislation on this basis on only five occasions. In each instance, the Court invalidated an attempt to punish individuals for political beliefs and affiliations, and the Court did so only upon unmistakable

evidence of punitive intent by the legislature and an absence of any legitimate non-punitive purpose. Three cases involved Civil War-era laws that imposed statutory disabilities on persons who refused to take an oath that they had not supported the Confederacy. *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1866); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866); *Pierce* v. *Carskadon*, 83 U.S. (16 Wall.) 234 (1872). The two 20th-century cases involved congressional attempts to punish "subversives" or members of the Communist Party by barring them from certain jobs. *United States* v. *Lovett*, 328 U.S. 303 (1946); *United States* v. *Brown*, 381 U.S. 437 (1965).

This Court has distilled from those decisions a three-part inquiry that reflects the limited scope of this constitutional restriction. To determine whether an Act of Congress constitutes legislative punishment, a court considers whether a statute (1) "falls within the historical meaning of legislative punishment"; (2) whether it "further[s] nonpunitive legislative purposes"; and (3) whether the legislative record "evinces a congressional intent to punish." *Selective Service*, 468 U.S. at 852. Without a persuasive showing on the first two prongs, "only the clearest proof could suffice to establish the unconstitutionality of a statute" on the basis of impermissible congressional motive alone. *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960).

2. The court of appeals correctly applied these decisions in holding that the challenged appropriations provisions are not unconstitutional bills of attainder.

a. The court properly concluded that a restriction on a corporation's ability to obtain discretionary grants and new government contracts in a particular fiscal year does not fit with the historically recognized forms of

punishment that this Court's decisions have discussed. Historically, bills of attainder involved "imprisonment, banishment, and the punitive confiscation of property" by the sovereign. *Selective Service*, 468 U.S. at 852. Like these traditional subjects of bills of attainder, "legislative bars to participation by individuals or groups in specific employments or professions," *ibid.*, are "a mode of punishment commonly employed against those legislatively branded as disloyal" and implicate the traditional understanding of a bill of attainder as punishment of "persons considered disloyal to the Crown or State." *Nixon*, 433 U.S. at 474; see also *Brown*, 381 U.S. at 455 (condemning the unsound "suggestion that membership in the Communist Party, or any other political organization," demonstrates general unfitness for government employment.").

A corporation's inability to bid for certain discretionary grants or new contracts in a single fiscal year may impose a burden, but it is qualitatively different from an individual's banishment from a profession. The court of appeals correctly observed that petitioners "are not prohibited from any activities; they are only prohibited from receiving federal funds to continue their activities." Pet. App. 21a. As the Court in *Selective Service* emphasized, a statute denying funds to which individuals had no entitlement "impose[d] none of the burdens historically associated with punishment" such as imprisonment, banishment, confiscation of property, and bars from employment. 468 U.S. at 852-853.

The court of appeals recognized that under circuit precedent, the Bill of Attainder Clause applies to statutes directed at corporations as well as measures aimed at individuals. It noted, however, that "[t]here may well be actions that would be considered punitive if taken

against an individual, but not if taken against a corporation." Pet. App. 20a (quoting *Consolidated Edison of New York, Inc.* v. *Pataki*, 292 F.3d 338, 351 (2d Cir.) (*Con Ed*), cert. denied, 537 U.S. 1045 (2002)) (brackets in original). Some of these distinctions are self evident and illustrated by this controversy. Corporations may merge, dissolve or reorganize—options that are not open to an individual. Thus, during this litigation, petitioner MHANY Management, Inc. changed its name from New York Acorn Housing Inc. to avoid association with ACORN, and as the court of appeals noted, HUD determined that MHANY is not an ally, affiliate, or subsidiary of ACORN. *Id.* at 4a n.2.

b. The court of appeals correctly concluded that the legislation directly furthers the legitimate, non-punitive purpose of promoting effective use of taxpayer money in the face of clear evidence of mismanagement and inadequate employee oversight. As the court observed, petitioners do not dispute that "Congress has a legitimate interest in ensuring the proper use of taxpayer money," but argue instead that the provisions are necessarily punitive because they specify ACORN by name and are unduly broad. Pet. App. 25a. The court of appeals correctly rejected these contentions.

Petitioners argue that "a law targeting a specific individual or firm * * * is presumptively suspicious" and that Congress "must show some non-punitive reason that would not merely justify the regulation of a class of individuals but explain why the affected entity is in a unique situation that demands special treatment irrespective of whether it is guilty of misconduct." Pet. 20; see also Pet. 16 (faulting the court of appeals for "never question[ing] whether the government had articulated a non-punitive reason to distinguish between ACORN

and the many other federal contractors who are accused of, admit to, or convicted of misconduct.").

These argument echo contentions advanced in *Nixon*, where the former President argued that "the Constitution is offended whenever a law imposes undesired consequences on an individual or on a class that is not defined at a proper level of generality." 433 U.S. at 469-470. Former President Nixon urged that the statute impermissibly "singl[ed]" him out, "as opposed to all other Presidents or members of the Government, for disfavored treatment." *Id.* at 470.

Rejecting these assertions, the Court explained that this "view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality." *Nixon*, 433 U.S. at 470; see also *BellSouth Corp.* v. *FCC*, 162 F.3d 678, 684 (D.C. Cir. 1998) (noting that this "Court's jurisprudence on this point is hardly surprising, because '[l]egislative measures often grant or withhold benefits or burdens from precisely identified individuals or groups'") (quoting Laurence H. Tribe, *American Constitutional Law* § 10-5, 650-651 (2d ed. 1988)) (brackets in original); *SeaRiver Mar. Fin. Holdings, Inc.* v. *Mineta*, 309 F.3d 662, 674 (9th Cir. 2002) ("[E]ven if [an] Act singles out an individual on the basis of irreversible past conduct, if it furthers a nonpunitive legislative purpose, it is not a bill of attainder.").

The court of appeals considered petitioners' contention that Congress might have chosen narrower means to achieve its end, but concluded that the form of the legislation did not suggest punitive intent. Pet. App. 26a-29a. Cf. *Nixon*, 433 U.S. at 482 ("[I]t is often useful

to inquire into the existence of less burdensome alternatives by which th[e] legislature (here Congress) could have achieved its legitimate nonpunitive objectives," when determining whether a law constitutes punishment prohibited by the Bill of Attainder Clause). The Second Circuit concluded that "it was entirely reasonable for Congress to broadly exclude ACORN's affiliates, subsidiaries, and allies from federal funds," noting that ACORN's own reports demonstrated that its organization and related entities "make up * * * an amorphous and sprawling family of organizations." Pet. App. 26a. In light of the complex structure of the "ACORN Family," and the fact that money is fungible, *e.g.*, *Sabri* v. *United States*, 541 U.S. 600, 606 (2004), Congress could reasonably determine that any federal money flowing to ACORN or related organizations was at risk of being misused or wasted, and that limited federal money would be better spent elsewhere.

In a similar vein, petitioners argue (Pet. 26) that the legislation was necessarily punitive because Congress could have allowed the Executive Branch to restore ACORN funding as soon as it determined "that certain conditions have been met." But Congress, not the Executive Branch, is responsible in the first instance for appropriating federal funds. That authority is, of course, cabined by various constitutional constraints and cannot be used to inflict punishment. The Constitution does not, however, bar Congress from legislating with specificity to safeguard the use of taxpayer money in contracts and grants, and does not authorize a court to set aside legislation on the ground that Congress might

have chosen to rely on the Executive Branch's slower and less certain administrative procedures.[7]

c. This Court has made clear that "[j]udicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed." *Flemming*, 363 U.S. at 617. The Court has thus cautioned that "only the clearest proof could suffice to establish the unconstitutionality of a statute" on the basis of impermissible congressional motive. *Ibid.* A legislative record cannot support a conclusion that a law is motivated by a desire to "punish" affected persons unless it presents "*unmistakable* evidence of punitive intent." *Selective Service*, 468 U.S. at 856 n.15 (emphasis added) (quoting *Flemming*, 363 U.S. at 619). Thus, in *Selective Service*, the Court declined to find that the challenged statute was punitive even though opponents of the measure considered it punitive and there were "several isolated statements" among the statute's supporters "ex-

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[7] Petitioners also contend (Pet. 25) that the funding restrictions were necessarily punitive because they were not made contingent on the results of the GAO investigation that the legislation also required, see p. 6, *supra*. The court of appeals properly determined that Congress could "modify the appropriations law following the GAO's investigation," and that a temporary ban on receiving government funds, coupled with the GAO investigation, was proportionate to Congress's legitimate, non-punitive purpose. Pet. App. 28a-29a. Indeed, GAO's investigation is not yet complete. GAO issued a preliminary report on June 14, 2010, stating that its "analysis related to these objectives is ongoing, [and] the information in this report is preliminary and subject to change." See GAO, *GAO-10-643R, Preliminary Observations on Funding, Oversight, and Investigations and Prosecutions of ACORN or Potentially Related Organizations* 2 (2010). GAO noted that it plans to issue a further, final report.

pressing understandable indignation over the decision of some nonregistrants to show their defiance of the [draft] law." *Ibid.*

The Second Circuit properly followed this precedent in holding that "there is not 'unmistakable evidence' of congressional intent to punish" petitioners, such that the temporary appropriations restriction is an unconstitutional bill of attainder. Pet. App. 23a. The court noted that in *Lovett*, "the congressional record was 'unmistakably' clear as to Congress's intent to punish the subject individuals," while here, "at most, there is the 'smattering' of legislators' opinions regarding ACORN's guilt of fraud." *Id.* at 31a.

3. Petitioners assert two purported inter-circuit conflicts, both of which are illusory. First, petitioners contend (Pet. 14-17) that the court of appeals created a conflict with the D.C. Circuit by not treating the funding restriction as "suspect" because of its specificity. The D.C. Circuit has endorsed no such principle.

In *Foretich* v. *United States*, 351 F.3d 1198 (2003), the D.C. Circuit held that Congress had overstepped constitutional bounds in resolving a custody dispute in favor of a child's mother on the "basis of a judgment that [the father had] committed criminal acts of child sexual abuse." *Id.* at 1204. The court noted that Congress had passed the statute after the D.C. Superior Court had dismissed the allegations of sexual abuse; from all the evidence, the court concluded that "[t]he Act memorializes a judgment by the United States Congress that Dr. Foretich is guilty of horrific crimes * * * despite the repeated and unwavering rejection of such claims by every court that considered them." *Id.* at 1223.

The D.C. Circuit stressed that its holding reflected the punitive nature of the statute, not its specificity.

Noting that "'virtually all legislation operates by identifying the characteristics of the class to be benefited or burdened,'" the court observed that "it is not clear that the specificity requirement retains any real bite." 351 F.3d at 1218 (quoting *BellSouth Corp.*, 144 F.3d at 63). Rather, specificity "is only the beginning of [the] inquiry" under the Bill of Attainder Clause, and under that inquiry, "the principal touchstone of a bill of attainder is punishment." *Ibid.* Thus, *Foretich* does nothing to establish a conflict concerning the validity of precisely focused legislation.[5]

Second, petitioners contend (Pet. 24-28) that the court of appeals' decision conflicts with other decisions that have examined whether equally effective but "less burdensome alternatives" existed. *Nixon*, 433 U.S. at 482; see *SeaRiver*, 309 F.3d at 677; *Foretich*, 351 F.3d at 1222. This Court has already established that such an inquiry "is often useful" in answering the question "whether a legislature sought to inflict punishment on an individual," *Nixon*, 433 U.S. at 482, but it has never suggested that legislation is subject to a least-restrictive-means test merely because the regulated party finds it burdensome. A law is not a bill of attainder if it is not punitive, and here (as in *Nixon* and *SeaRiver*) the law is not punitive. Moreover, the court of appeals' analysis explains why petitioners' proffered less burdensome alternatives would not in fact be equally effective: in particular, ACORN's complex structure gave Congress a valid reason to include ACORN's subsidiaries and affiliates in the restriction

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[5] In any event, narrow focus is more easily justified in the appropriations context, as in this case: Congress often operates with great specificity when prescribing how appropriated funds are to be spent, and that specificity does not by itself reveal any punitive intent.

alongside ACORN itself. Pet. App. 26a. Because the means Congress chose were proportionate to its legitimate ends, *id.* at 23a-29a, no further means-ends scrutiny was necessary.

4. This Court has not addressed whether the Bill of Attainder Clause applies to corporations. Cf. *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 779 n.14 (1978) ("Certain 'purely personal' guarantees * * * are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals.") (quoting *United States* v. *White*, 322 U.S. 694, 698-701 (1944)). Petitioners (which are corporations) therefore are mistaken in their assertion that the *way* in which the court of appeals has applied the Clause to corporations conflicts with this Court's precedent.

The court of appeals *agreed* with petitioners that the Bill of Attainder Clause protects corporations. See Pet. App. 18a (citing *Con Ed*, 292 F.3d at 349). Petitioners nevertheless ask the Court to consider whether the Clause would apply to corporations in precisely the same manner as to individuals in this suit. Answering that question would require this Court to examine whether the Clause applies to corporations at all.[9] And neither that larger question nor the secondary question that petitioners present independently warrants review: the courts of appeals generally agree that to the extent the Clause protects corporations, "[t]here may well be actions that would be considered punitive if taken against an individual, but not if taken against a corporation." *Id.* at 20a (quoting *Con Ed*, 292 F.3d at 354); accord

[9] There is a substantial historical argument that it would not. See, *e.g.*, 1 William Blackstone, *Commentaries* *464 (an aggregate corporation "is not liable * * * to attainder").

BellSouth Corp., 162 F.3d at 683-684 ("[I]t is obvious that there are differences between a corporation and an individual under the law," and therefore "any analogy between prior cases that have involved individuals and this case, which involves a corporation, must necessarily take into account this difference.").

In any event, there is no indication here that the Second Circuit would have applied a different analysis if petitioners were individuals with a history of mismanagement who applied for discretionary federal grants and contracts. Rather, the outcome of this case turned on the legitimate purpose of the funding restriction.[10]

5. Even if the question presented might warrant review in an appropriate case, this is not such a case, because in the posture of this case the resolution of that question may well not matter, for several reasons.

a. As an initial matter, the petition is interlocutory. Petitioners brought suit on three theories, but only one was the basis for the decisions below. The court of appeals' decision returned the case to the district court for further proceedings on petitioners' First Amendment and due process claims, Pet. App. 32a, which if success-

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[10] Petitioners' reliance (Pet. 29) on this Court's jurisprudence regarding corporations' First Amendment rights is inapposite. A corporation's protection against being debarred from government business for refusing to support a political party or its candidates, see *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712 (1996), or to engage in political speech, see *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010), is unrelated to Congress's authority to temporarily halt discretionary federal funds to an organization with a history of mismanagement. Petitioners have asserted no right to receive federal money, and their analogy to the lifetime employment bar held invalid by this Court in *Lovett* makes no attempt to grapple with the distinctions inherent in the application of the Bill of Attainder Clause to a corporation rather than to an individual.

ful would presumably yield the same result that petitioners seek here. The district court has stayed those proceedings pending disposition of the petition for a writ of certiorari. See p. 10, *supra*.

b. Indeed, while petitioners are litigating those claims on remand, there is a significant possibility that the case will become moot. Petitioners seek prospective relief against legislation that is currently set to expire a few months from now, on September 30, 2011. See p. 7, *supra*; see also 2d Am. Compl. 37-39 (seeking only prospective relief, costs, and attorney's fees). Although it is possible that Congress might extend current law into the next fiscal year or adopt another funding restriction applicable to petitioners in some form, the adoption of *new* legislation—which would come with a new legislative record, potentially including information developed in the ongoing GAO investigation, and which might have a different scope—would not be sufficient to keep alive petitioners' arguments against the current legislation. Because petitioners seek interlocutory review in a case challenging a statute that may no longer be in force by the time this Court convenes for its next Term, plenary review is not appropriate at this time.[11]

c. Petitioners' own ability to press a justiciable controversy is also uncertain. Two of the three petitioners, ACORN and Acorn Institute, have filed for relief under Chapter 7 ("Liquidation") of the Bankruptcy Code, 11 U.S.C. 701 *et seq.* See *In re Acorn Inst., Inc.*, No. 10-50362 (Bankr. E.D.N.Y. filed Nov. 2, 2010); *In re Association of Cmty. Orgs. for Reform Now*, No. 10-50380

[11] If the case remains justiciable, petitioners would be able to seek this Court's review after final judgment, even on questions finally decided at this interlocutory stage. See, *e.g.*, *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 (2001) (per curiam).

(Bankr. E.D.N.Y. filed Nov. 2, 2010). Because petitioners derived only a small fraction of their funding from federal grants and contracts, see p. 9, *supra*, it is highly questionable whether even the relief petitioners seek would provide a sufficient infusion of funding to cause them to change their plans to liquidate. And the fact that petitioners are now insolvent might well be an independent reason not to award them new grant monies or contracts.

The third petitioner, New York Acorn, has reorganized and is now known as MHANY Management, Inc. After MHANY's reorganization, HUD concluded that MHANY was no longer an "affiliate, subsidiary, or allied organization of ACORN." See note 6, *supra*. The allegations in the complaint pertaining to MHANY focused on housing related funds. See 2d Am. Compl. ¶ 23. MHANY's continued stake in challenging the funding restriction, therefore, is questionable at best.

Because this case involves a challenge to a statute set to expire and was brought by plaintiffs that may no longer have a concrete stake in the challenge, the most appropriate course at this point is to allow proceedings in the district court to resume.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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